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Supreme Court of the United States

OCTOBER TERM, 1955

No. 806

PAUL EDWARD ROWTON, CHARLES FREELAN WHEELER and REUBEN JONES STEPP, Petitioners

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MEMORANDUM SUPPLEMENTING PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

When the petition in these cases was prepared, three points were overlooked that ought to be drawn to the attention of the Court. They are (1) the historical background in the Selective Service System for the appointment of advisors to registrants, (2) the argument of the Government of the availability of the government appeal agent and the members of the local board to assist registrants as grounds for denial of the assistance of advisors (which

point was argued by the Government in the courts below but not passed upon), and (3) the amendment of the regulation (32 C. F. R. § 1604.41) so as to change the word "shall" to "may" (Executive Order 10,594, Jan. 31, 1955, 20 F. R. 735).

I.

The first regulation establishing advisors to registrants was published in Executive Order No. 8545, on September 23, 1940. These regulations required an advisory board to be composed of three lawyers, with the chairman being a judge of a county court or a court of similar jurisdiction whenever possible. Paragraph 145 of this Order stated that these boards shall "insure that advice and assistance in preparing questionnaires, claims, etc. are readily available to every registrant." Paragraph 321 provided that Advisory Boards would help registrants fill out questionnaires, and the local boards should request newspapers to publish full information about the advisory boards. It provided, in addition, that registrants who asked the local boards for advice or assistance should be directed to the advisory board. Paragraph 513 provided that members of the advisory board should serve without compensation.

By amendment effective December 9, 1940, the duties of the advisory board were further defined "to insure that advice and assistance in preparing questionnaires, claims, or other papers which will serve as a basis for classification are readily available to every registrant."

These original regulations were numbered to conform with the requirement of publication in the Federal Register on February 1, 1943. On that date paragraph 145, as amended, was renumbered as section 603.41, and paragraph 321 was renumbered Section 621.6 of the Selective Service Regulations. Amendment No. 318, effective July 6, 1945, deleted section 621.6 in its entirety because it had served its purpose. In the printing of the regulations which went into effect on July 31, 1945, Section 603.41 was fur-

ther amended to provide that "advice and assistance in preparing Selective Service questionnaires (Form 40), claims, or other papers which will serve as a basis for classification . . ." Amendment 418, effective January 8, 1947, deleted Section 603.41 in its entirety for the reason that the appointment of advisory boards for registrants was no longer considered necessary.

In 1940 the selection and drafting of men for military service was a system which had not been necessary for some 22 years. Since the public generally was totally unfamiliar with their duties and responsibilities, the 1940 Advisory Boards fulfilled a very real need in furnishing accurate information to the registrant. As can be seen from this brief history, these Boards carried out their mission successfully. In January 1947, when the Selective Training and Service Act of 1940 expired, the Advisory Boards themselves were discontinued.

When the 1948 Act (50 U. S. C. App. §§ 451-470) was passed the President promulgated Section 1604.41 of the Selective Service Regulations (32 C. F. R. § 1604.41, E. O. 9979, 13 F. R. 4179). (See pages 2-3 of the petition.) This regulation was to provide for assistance of advisors in preparing papers to be filed with local boards by registrants in the same manner as the registrants under the 1940 Act (50 U. S. C. App. §§ 301-318). The history shows that the purpose in having advisors was real and practical and necessary in order that the selection of registrants would be fair and just.—62 Stat. 605, 50 U. S. C. App. § 451 (c); *Gonzales* v. *United States,* 348 U. S. 407, 417 (1955).

II.

When a registrant is given his final classification by the local board he is mailed a notice of classification (SSS Form No. 110). On this card it says that for advice see the government appeal agent. The Government in the

courts below argued that this notice of help by the government appeal agent was adequate in lieu of help by advisors provided in 32 C. F. R. § 1604.41.

Section 1604.71 of the Selective Service Regulations (32 C. F. R. § 1604.71) provides for the duties of the government appeal agent. Section 1604.71 (d) (5) requires that the government appeal agent protect "the interests of the Government and the rights of the registrant in all matters." The government appeal agent, however, is not the official prescribed by law to assist the registrants *before the local board.* He has an altogether different duty. He is required to assist the registrants only before the appeal board; he is required to help the registrants take their appeals.

His assistance and notice of it come into play only after the registrants have lost their cases before the local board. Before local board action no notice of such help was given. Any notice that they get later is entirely too late. The principle that a *de novo* appeal board classification does not cure a local board denial of procedural due process also would apply in the giving of help by a government appeal agent in the preparation of appeal papers and the availability of such belated help by him.

The regulations specifically provide for the help of advisors to registrants in matters pertaining to the fixing of forms and the preparation of papers to be filed with the local board. All this help comes long before the appeal agent gets into the picture. What is the sense of having advisors to registrants if the availability of the government appeal agent after the local board denial makes harmless the failure to give the assistance of advisors? The position the Government takes about the help of the government appeal agent makes vestigial the provision for the help of advisors to registrants. The availability of the help of the government appeal agent does not strike

out the assistance of advisors to registrants prescribed by the regulations.

The Government also argued in the courts below that the local board members were available to render assistance. This statement is unsupported by any proof. The local board members are not required by law to render assistance to the registrants. That is why the regulations prescribe advisors to registrants. Local board members are always busy at all times with hearings and consideration of cases. They have no time at all available to help registrants prepare their papers. It is contrary to public policy for the judge of a tribunal to act as counsel. Such would be the case if local board members were required to assist registrants. Advisors have been provided by law so that the inconsistency and burden of assisting registrants would not fall upon the members of local boards.

III.

The regulation (32 C. F. R. § 1604.41) was amended on January 31, 1955 (E. O. 10594, 20 F. R. 735), whereby the appointment of advisors was changed. The word "shall" was changed to "may." The amendment of the regulation did not do away with the appointment of advisors altogether. The amended regulation makes the appointment discretionary with the Director of Selective Service. This does not mean to say that advisors are not still being appointed. Indeed they are being appointed and, if, as and when appointments are made, the responsibility of the local boards is still the same. The regulation still makes mandatory, by the use of the word "shall," that the local boards post the names and addresses of advisors to registrants. The question is by no means moot. The importance of the question and the large number of people affected by it have not diminished any by the amendment. These cases are still important and the question is one that will continue to arise in the future because there are outstanding hundreds of orders of the Director of Selective Service

appointing advisors to registrants under the Selective Service Regulations.

Section 1604.41 of the Selective Service Regulations (32 C. F. R. § 1604.41) (as it existed at the time of these cases) provides that advisors to registrants "*shall* be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms." (Emphasis added.)

The duty on the part of the Director of Selective Service in these cases is mandatory. Under the regulations it is the duty of the State Director to recommend the names of advisors. Since the duty of the Director of Selective Service is mandatory, he is required to call upon the State Director to recommend the names of advisors to registrants for appointment. The duty of the Director of Selective Service does not hinge upon the recommendation of the State Director (who is his subordinate). The regulation does not say that the Director of Selective Service shall appoint advisors *if* a recommendation is made by the State Director. The regulation does not read "in the event of" such recommendation by the State Director. The use of the words "upon recommendation" is merely to the State Director to recommend to the Director of Selective Service the names of advisors. The appointment of advisors is mandatory upon the Director of Selective Service and does not hinge upon the discretion or whim of the State Director under the words "upon recommendation" used in the regulation.

The Court should bear in mind that the regulation in this case, providing for the appointment of advisors to registrants, is a nationally uniform law. It was promulgated by the President, to be followed in all of the states, possessions and territories of the United States. If the argument is accepted, that the carrying out of the presidential mandate is not mandatory upon the Director of

Selective Service, but is contingent upon the "recommendation" of the State Director, then the law will not be uniform. It will be different according to the judgment, thoughtfulness or whim of the different State Directors. There would be no uniformity in the carrying out of the law. The regulation uses the word "shall," which is synonymous to "must." The regulation puts a mandatory obligation upon the Director of Selective Service to make the appointments throughout the entire United States. To accept the contention that the mandatory requirement becomes effective only at the discretion of the State Director is to stultify the use of the word "shall" in the regulation.

CONCLUSION

For the reasons stated in the petition and in this supplemental memorandum the petition for writ of certiorari in these cases ought to be granted.

Respectfully submitted,

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